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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 50

THE UNITED STATES, PETITIONER

vs.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 1, 1946
CERTIORARI GRANTED APRIL 22, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 902

THE UNITED STATES, PETITIONER

vs.

THE HOWARD P. FOLEY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 45739

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

v.

THE UNITED STATES

Petition

Filed August 19, 1942

To the Honorable, The Court of Claims:

1. The plaintiff, The Howard P. Foley Company, Inc., is a corporation duly organized and existing under the laws of the District of Columbia, and was at the time herein mentioned engaged in the business of electrical contracting and in the installing and furnishing of electrical wiring and lighting systems.

2. On June 27, 1940, the United States, acting through the Civil Aeronautics Authority, entered into a contract with the
2 plaintiff for the furnishing of the materials and performance of the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with the specifications, schedules and drawings, which were by reference made a part of the said contract, all for the sum of $187,000. A copy of the pertinent parts of said contract is filed herewith as Exhibit "A" and by reference made a part hereof.

3. The contract provided in Article 9 thereof that should the contractor fail to prosecute the work or any part thereof within the time specified in the said contract, the United States might by written notice terminate its right to proceed with the work. It further provided that the right of the contractor to proceed should no be terminated nor should he be charged with liquidated damages because of delays in the completion of the work due to unforeseeable causes beyond its control and without its negligence, including acts of the Government, and that in the event of a delay from such cause the contractor should notify the contracting officer in writing of the causes of delay and that the latter should ascertain the facts and extent of the delay and extend the time for completing the work when in his judgment the findings of fact justified such an extension, and his findings of fact should be final and conclusive on the parties, subject only to an appeal therefrom within 30 days. Article 15 of the contract provided that, except as otherwise provided in the contract, all disputes concerning questions of fact arising under the contract should be decided by the

contracting officer, subject to written appeal by the contractor within 30 days to the head of the department or his representative, whose decision should be final and conclusive upon the parties thereto.

3 4. The plaintiff entered into and upon the performance of its contract on or about July 16, 1940, and proceeded to construct and completed the work required. The United States, however, failed to make available to the contractor the site upon which the work was to be done, either at the time the contract was made or at the time the plaintiff was required to commence its work thereunder. Portions of the site were made available to the plaintiff at various times and in irregular and disconnected sections. As a result thereof the plaintiff was delayed a total of 157 days in the completion of the work under its contract, and its performance was extended 157 days beyond the time necessary to its completion except for such delays.

5. The plaintiff gave written notice to the contracting officer of the fact of these delays and the contracting officer thereupon found that the plaintiff was delayed by the failure of the United States to furnish the site in sufficient time to enable it to complete the work within the time prescribed in the contract, and that the plaintiff was thereby prevented from starting and performing its work in an expeditious manner. The contracting officer further found that a total of 157 days of delay from this cause was occasioned the plaintiff in the performance of its work under the contract. No appeal was taken from the finding of the contracting officer by either the plaintiff or the United States.

6. As a result of the failure of the United States to furnish the site for the work, the plaintiff was required to proceed in an irregular and uneconomical manner in the performance of the work under the contract, and by reason of the extended period of
4 performance of 157 days, the plaintiff incurred and was obliged to pay additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and as a further incident of such delay additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces likewise accrued, together with an additional general overhead to the plaintiff in the administration of its business.

7. The total amount of additional expense and damage incurred by the plaintiff on account of the delays occasioned by the United States is $14,761.38.

8. The plaintiff filed its claim with the Civil Aeronautics Authority for reimbursement of said expense and the said claim was disallowed by the said Authority.

9. No other action has been had on said claim in Congress or by any of the other departments. No person other than the plaintiff is the owner thereof nor interested therein. No assignment or transfer of this claim or any part thereof or interest therein has been made. The plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abbetted or given encouragement to rebellion against the said Government. The plaintiff claims $14,761.38.

HINTON & HERON,
By ALEXANDER M. HERON,
Attorneys for Plaintiff,
Munsey Building, Washington, D. C.

[*Duly sworn to by Howard P. Foley; jurat omitted in printing.*]

Exhibit "A" to petition

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 27th day of June, 1940, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and the Howard P. Foley Company, Inc. a corporation organized and existing under the laws of the District of Columbia a partnership consisting of
an individual trading as
of the city of Washington in the State of District of Columbia hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with the bid on Bid No. 1 of Proposal No. 519, for the consideration of $187,000.00 in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Proposal No. 519 and specifications and drawings mentioned therein and attached thereto.

The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor for proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The

contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * *

ARTICLE 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay.

In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head

of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on
11 the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ARTICLE 11. *Eight-hour law—Convict labor.*—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

* * * * *

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his
12 own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * * *

ARTICLE 17. *Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1) this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor and subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

* * * * * *

ARTICLE 21. *Definitions.*—(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the terms "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

14 In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By C. M. Estep,
C. M. ESTEP,
Chief, Office Service Division.
THE HOWARD P. FOLEY COMPANY,
INC., *Contractor.*
H. P. FOLEY, *President,*
2020 Eye St. NW., Washington, D. C.

Attest:
[CORPORATE SEAL] MARTIN RISTIG, *Sec'y.*

15 *General traverse*

Filed September 28, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) FRANCIS M. SHEA,
Assistant Attorney General.

P. M.
E. E.

Argument and submission of case

On October 8, 1945, the case was argued and submitted on merits by Mr. Alexander M. Heron for plaintiff and by Mr. Robert Burstein for defendant.

Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.

Filed December 3, 1945

Mr. Alexander M. Heron for the plaintiff. Hinton & Heron were on the briefs.

Mr. Robert Burstein, with whom was Mr. Acting Assistant Attorney General John F. Sonnett, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and report of a commissioner, makes the following

Special findings of fact

1. The plaintiff is a corporation organized and existing under the laws of the District of Columbia with an office and place of business in the city of Washington, D. C. It is engaged in the business of contracting for electrical work and in the installation and furnishing of electrical wiring and lighting systems.

2. On June 27, 1940, the plaintiff entered into a written contract with the defendant, represented by C. M. Estep, Chief, Office Service Division, Civil Aeronautics Authority, as contracting officer, whereby the plaintiff, for a consideration of $187,000, agreed to furnish the materials, and perform the work for field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with its bid and proposal and specifications and drawings mentioned therein and attached thereto, the work to be commenced as soon as practicable and be completed within 120 calendar days from the date of receipt of notice to proceed.

18 Notice to proceed was received by the plaintiff July 15, 1940, thus fixing the time for completion on or before November 12, 1940.

Article 1-11 of the specifications provided:

"*Interference with business.*—(A) The Government's Representative, under whose direction the work will be performed, shall be consulted as to the time and manner of starting the work so as to cause the least interference with other contractors. The contractor shall keep sufficient men and materials at the site to insure completion of the work within the specified time.

"(B) The work shall be carried on in such manner that there will be no interruption to or interference with the proper execution of Government business."

Article 3-16 of the specifications provided:

"*Knowledge of conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract."

Article 3-25 required cooperation of the contractor and coordination of his work with other work.

Article 5-2 provided:

"As the paving of the runways and taxiways is completed, the rough grading of the shoulders will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract."

Article 9 of the contract gave the contracting officer authority to extend the time of performance, under findings of fact to be made by him, "when in his judgment the findings of fact justify such an extension."

Copy of the contract and specifications is filed in evidence and made part hereof by reference.

3. Immediately upon receipt of the notice to proceed the plaintiff proceeded with the work, prosecuted it to completion,
19 and has been paid the contract price as adjusted by change orders. Performance by the plaintiff was completed April 18, 1941, a delay in completion, based on the original contract time, of 157 days.

4. Soon after the inception of plaintiff's work it discovered that due to extended periods between releases by the defendant of areas that the plaintiff could work on, it would be unable to finish in contract time.

The plaintiff complained of this situation to the resident engineer of the Civil Aeronautics Authority and on September 3, 1940, explained the situation to the contracting officer, asking for an extension of time and adjustment for additional overhead and expense.

On September 23, 1940, the contracting officer replied, instructing the plaintiff to keep both the resident engineer and the contracting officer currently informed as to all matters of delay, and stating that upon completion of the work, consideration would be given to an appropriate extension of time.

The plaintiff complied with this procedure and both parties to the contract were fully informed as to delays.

December 20, 1940, the contracting officer made the following findings of fact and communicated them in writing to the plaintiff:

"Reference is made to your letter of December 4, 1940, and previous correspondence, as well as to your personal discussion of December 13, 1940, with our Mr. W. C. Thompson, relative to your request for an extension as of December 12, 1940, in time of performance of contract numbered CAA-2704, covering the field lighting at the Washington National Airport, Gravelly Point, Virginia, in accordance with your bid on proposal invitation numbered 519. The facts in the case are summarized as follows:

"Contract time was 120 calendar days from date of receipt of notice to proceed. Order numbered 41-1600, dated July 8, 1940, constituted your notice to proceed, and was received by you on

July 15, 1940, thus fixing July 16, 1940, as the starting date of your contract time. Up to December 12, 1940, 150 calendar days had elapsed.

"The contract provided for a liquidated damage deduction of $100.00 per day for each day of delay in completion of the work, but further provided that the contractor shall not be charged liquidated damages because of any delay in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to acts of the Government, acts of another contractor in performance of a contract with the Government, etc.

"It has been established that the Government has, by force account, graded certain areas of the airport and released such graded areas to the paving contractor. Upon completion of the paving such areas were released to you for starting work under your contract.

"Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. It is further represented that you maintained adequate administrative personnel to perform supervision of the W. P. A. forces which could have been utilized had no delays existed and had the areas been released to you when you were ready for them. It further appears that all equipment and materials to be furnished by you were ready or could have been ready for use in time to have allowed you to perform the work immediately upon release of the areas to you and that no delay would have been chargeable to you in this respect. In the circumstances you are entitled to an extension of contract time commensurate with the actual delay caused you by such conditions.

"Under the provisions of the contract you were to be furnished not to exceed 180,000 W. P. A. man-hours for the entire project. By dividing this number of man-hours by the contract time of 120 calendar days gives an average of 1,500 man-hours which the-

oretically could have been used by you each day during the contract time. On this basis, the number of man-hours of
21 W. P. A. labor actually furnished you under your contract (106,551, as indicated by the records of the United States Engineer's office from July 16, the effective date of notice to proceed, through December 12, 1940) represents work of 71 full days. Inasmuch as 150 calendar days elapsed between the dates mentioned, it appears to be established that you have been delayed 79 days by the conditions set forth herein. In the circumstances this letter authorizes an extension of contract time of 79 days up to and including December 12, 1940.

"In the event of delay subsequent to December 12, 1940, and the receipt of proper notice from you relative thereto, a further finding of facts will be prepared by this office at the appropriate time."

Delays in delivering areas to the plaintiff continued and defendant's officers were concurrently informed as to such delays.

Again, on May 17, 1941, after plaintiff's work was completed, the contracting officer made findings of fact and communicated them to the plaintiff in writing as follows:

"I have your letter of April 22, 1941, in which you request an additional increase in time of performance of 86 days under contract numbered CAA-2704, entered into with you by the Civil Aeronautics Administration covering the lighting of the Washington National Airport, Gravelly Point, Virginia.

"Contract time was 120 calendar days from date of receipt of notice to proceed. Order numbered 41-1600 dated July 8, 1940, constituted your notice to proceed and was received by you on July 15, 1940, thus fixing July 16, 1940, as the starting date of your contract time. Under date of December 20, 1940, you were granted an increase of 79 days in time of performance. This extension represented delays due to unforseeable causes which existed during the period July 16, 1940, to December 12, 1940, both dates inclusive, and thus fixed the final due date for completion as January 30, 1941. Performance was completed on April 18, 1941, after a delay of 78 days.

"The contract provided for a liquidated damage deduction of $100.00 per day for each day of delay in completion of the work but further provided that the contractor should not be charged liquidated damages because of any delay in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but
22 not restricted to acts of the Government acts, of another contractor in performance of a contract with the Government, etc.

"It has been established that the Government has, by force account, graded certain areas of the airport and released such

graded areas to the paving contractor. Upon completion of the paving such areas were released to you for starting work under your contract.

"Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner.

"It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected and if the building had been completed by the time you were ready to start installation of the control desk.

"It is further represented that you maintained adequate administrative personnel to perform supervision of the W. P. A. forces which could have been utilized had no delays existed and had the areas been released to you when you were ready for them. It further appears that all equipment and materials to be furnished by you were ready or could have been ready for use in time to have allowed you to perform the work immediately upon release of the areas and building to you and that no delay would have been chargeable to you in this respect. In the circumstances you are entitled to an extension of contract time commensurate with the actual delay caused you by such conditions.

"Under the provisions of the contract you were to be furnished not to exceed 180,000 W. P. A. man-hours for the entire project. By dividing this number of man-hours by the contract time of 120 calendar days, which is a reasonable time for completion of the contract under ordinary circumstances, gives an average of 1,500 man-hours which theoretically could have been used by you each day during the contract time.

23 "From December 13, 1940, to April 18, 1941, an elapsed time of 127 days, you were furnished 26,011 W. P. A. man-hours. At the theoretical daily rate of 1,500 hours the man-hours actually employed represents 17.34 full working days. This condition was brought about by circumstances beyond the control and without fault or negligence on your part, and establishes that you were delayed approximately 110 calendar days due to excusable causes as contemplated by the contract provisions.

"Incidentally it might be well to state that the control tower should have been available to you during the early part of last fall but due to delays in connection with the building construction your installation could not be started until March 6, 1941. The installation of the control desk requires approximately two weeks and installation was performed by you in normal time without evidence of delay on your part.

"It might be held that no laborers would have been employed by you during the two weeks that you were engaged in installing the desk in the control tower, but it is not considered necessary to consider this phase of the matter since if this time of two weeks is deducted from the 120 days contract time the daily theoretical average of man-hours, would have been increased over the 1,500 hours which is used as a basis for determining the extension to which you are entitled, and would give the same results.

"Inasmuch as you have exceeded your contract time by only 78 days this letter authorizes an extension of 78 days due to unforeseeable causes of delay beyond your control and without your fault or negligence. No liquidated damages will be deducted from your final voucher."

No evidence has been proffered that the facts were contrary to those found by the contracting officer.

No liquidated damages for delay have been charged against or collected from the plaintiff.

5. The site of the Washington National Airport at Gravelly Point, Virginia, was created by hydraulic dredging. The defendant's engineers were faced with the problem of making the airport available for use long before the time it would take an ordinary hydraulic fill to become sufficiently consolidated to withstand heavy traffic.

Where it would ordinarily take four or five years for stabilization, the engineers were seeking to effect proper stabilization in less than one year.

24 Before the letting of plaintiff's work, or the beginning of any major work at the site, the defendant's engineers knew that they were confronted with a problem of quick stabilization.

There were to be four runways, (1) North-south, (2) East-west, (3) Northeast-southwest, and (4) Norwest-southeast. These runways were used as a sort of framework and the hydraulic dredges first deposited material on the runway sites. The heavier and coarser material remained on the runways, and the finer material, "fines" as they were called, flowed over to the side. Two dredges worked simultaneously on a runway, moving towards each other, and the union, where they met, was filled with the lighter material, which sloughed and had to be replaced.

In the dredging process pockets of unsatisfactory material were found, and had to be replaced with satisfactory material. Where the material on the surface was of coarse, granular material, such as sand, it had to be mixed in definite proportions with fine or clayey material, in order to achieve the necessary compaction.

Paving of the runways was the last operation thereon. When an area had been properly filled, graded and surfaced, it was released to the plaintiff for trench and conduit work, wiring, installation of manholes, handholes, lights and other work pertaining to its contract in that area. This work was done in the shoulders of runways and taxiways, and, due to the necessity of maintaining stabilization, could not be done before the paving.

As the fill progressed there was a lack of uniformity in the material deposited, and the areas were not, as a consequence, ready for delivery to the plaintiff except in detachments. There was a marked lack of continuity in plaintiff's work, due to the scattered deliveries thus made.

The length of time taken to make the fill, stabilize the material, do the grading and paving, was not anticipated by the defendant's engineers. They were skillful and diligent in their work, and released areas to the plaintiff as fast as they were able to do so.

There is no evidence in the case upon which a finding can be made as to delays by the paving contractor, referred to in the contracting officer's findings of facts.

25 6. By reason of the delays for which the contracting officer found the plaintiff was not responsible, the plaintiff incurred expenses for field overhead which it would not otherwise have incurred.

It was necessary for the plaintiff to maintain a supervisory force on the job continuously, standing by for resumption of work. The defendant could program the work of excavating, filling, grading, paving only a short distance ahead, and plaintiff could not in consequence keep to any definite schedule for any reasonable time in advance. The plaintiff could not hire and fire so-called key men with every segment of the work released by the defendant.

In consequence of the delay of 157 days suffered by the plaintiff, it incurred extra expense in the sum of $6,393.69, made up of $5,996.65 for pay roll of supervisory employees for the extent of delay, and $397.04 for compensation insurance, liability insurance, and old age and unemployment taxes on such pay roll.

Due to the fact that releases were made to the plaintiff in such manner as to require of plaintiff intermittent instead of continuous work, certain equipment of the plaintiff, powered by gasoline or oil, carried smaller loads or was operated in a less efficient manner. The cost of the additional gas or oil, necessary by reason of this situation, is not satisfactorily proved.

The protracted period of plaintiff's contract work necessitated keeping on the site of the work or in reserve therefor, beyond the original time for completion, utility trucks equipped with tool boxes and winches, and a pick-up truck. These trucks required repairs and maintenance during the periods of delay as well as during the periods of performance. It is not shown what extra expense there was, if any, in such repairs and maintenance due to the delay. The rental values of such equipment, testified to, are excessive in amount and there is no way of fixing upon reasonable rental values for the period of delay.

Water drained into the excavations for plaintiff's manholes, until the manholes, which were of concrete, could be installed. Plaintiff used pumps in keeping the excavations free of water.

There is no satisfactory proof as to the extent of extra time,
26 if any, that the pumps were kept in operation due to the delay, nor is the proof satisfactory as to rental values of the pumps so employed.

7. On or about August 13, 1941, the plaintiff filed a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays on the contract here in suit. The claim was stated in the amount of $18,304.94 plus 10 percent for overhead. The claim was denied January 29, 1942, for lack of jurisdiction, and no part thereof has ever been paid to the plaintiff.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,393.69.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand three hundred ninety-three dollars and sixty-nine cents ($6,393.69).

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

The plaintiff had a contract with the Civil Aeronautics Authority to furnish and install the field lighting at the Washington National Airport.

The airport was constructed at Gravelly Point, Virginia, and was on "made land." The site was created by hydraulic dredging and one of the problems before the Government engineers was how to expedite stabilization of the dredged material, which of course was heavily charged with water. Instead of using the conventional method of erecting boundary dykes and pouring the dredged material within the boundary thus made, with overflowing water, the engineers conceived the idea of pouring the dredged material

directly on the location of the projected runways, letting the finer materials flow off to the sides. Even with this expedited process there were difficulties that retarded the work, for pockets of fines would inevitably form, and, where two dredges worked
27 toward each other, there would be fine material at the point of union, which had to be excavated and replaced with compactible material, necessary for the foundation of the runway. The runways were to bear the burden of heavy traffic, the landing and taking off of planes.

Plaintiff's work could not proceed until the ground was ready. Plaintiff claims that its work, or some of it, could have proceeded before the final surface had been finished, but that was a matter for defendant's engineers, not the plaintiff, to decide. Plaintiff's work was essentially a "follow-up" job, just as is that of a plumber.

Article 1–11 of the specifications gave direction of the work to the Government's representative.

Regardless of any eventual practical considerations in the field, plaintiff knew beforehand that releases would be made to it only as paving of runways and rough-grading of shoulders were completed. Article 5–2 of the specifications gave priority to such paving and rough-grading.

Plaintiff's complaint, however, is not that the work was released to it in sections, but that the releases were so far apart as to extend its time for performance unduly and unreasonably.

The contracting officer seems to attribute some of the delay to the paving contractor, but the plaintiff does not rely on the paving contractor's responsibility for tardiness and we are without factual information with regard thereto.

The Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them.

The contracting officer's findings of fact charge delay in releasing certain stabilized areas to "unforeseen" soil conditions. This job involved an hydraulic fill. In every respect operations appear to have proceeded according to plan, a novel plan, and the plan, so pursued, expedited matters greatly.

But charging delay to "unforeseen" conditions is not charging them to "unforeseeable" conditions, which Article 9 of the contract provides for. There is nothing present in the contract situation, as evidenced here, that made soil conditions unforeseeable.
28 Apparently the fill was just what was expected, the coarser material remaining in the runway, the fines sloughing off to the side, precisely as planned.

There is no other conclusion than that the original time limitation of 120 days was a mistaken calculation, neither more nor less.

It turned out that way, whether the Government's contracting officer knew it in the beginning or not.

This case is to be distinguished from Crook Co. v. United States, 270 U. S. 4. In that case it was said, referring to a time limitation such as we have here: "But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work." Id., 6. We understand this to mean that the provisional nature of the time limitation, is just that, "provisional" not independent, and what makes it provisional is the reservation of "the right to make changes and to interrupt the stipulated continuity of the work." What the Supreme Court was considering was the interlocking of two contracts, the construction or prime contract and the follow-up contract. In the instant case there is no construction or prime contract, except as plaintiff's contract may be considered the "prime" contract.

In the Crook case, supra, the right to make changes in the prime contract was operative and that is what the Supreme Court obviously had in mind. The construction work was being done by the prime contractor, the Crook Company's work of installing a heating system being dependent upon the prime contractor's progress. The fact that the basic work of construction was being done by another contractor brought the provision for changes into play.

The Government does not order itself to make changes. The contracting officer's findings of fact indicate that the grading was done by "force account," that is, by a force of men hired by the Government, and not done through a contractor, except as to paving, in respect to which there is no record upon which any material finding can be made. Under these circumstances, there was no room for changes. There was no prime contract to be changed.

The time limitation in plaintiff's contract therefore, under
29 this view, was not provisional, because provisionality was dependent upon the existence of an operative change clause in the prime contract. This change clause is here wholly absent, and the Government's obligation is fixed accordingly.

It would be a strained construction to take the contract here in suit as allowing one of the contracting parties, the defending Government, an unlimited time for performance.

The Government set the time for performance, 120 days, and both parties had certain things to do within that time. The period of actual performance turned out to be 277 calendar days, as compared with the original contract time of 120 days. As appears by the findings of fact, plaintiff's was a follow-up contract, so that the period of 277 days represents practically the time consumed by both parties running concurrently. The extra

time of 157 days is not chargeable to delays, strictly speaking, for defendant's engineers were "skillful and diligent in their work." It is not chargeable to changes, for there were none. It is not chargeable to any act committed or omitted by the plaintiff.

There is no prime contractor here that might have delayed the plaintiff's work, a situation present in the Crook Co. case, supra, which would give a provisional character to the time clause. In the Crook case the presence of a prime contractor made the time clause in the follow-up contract provisional, because the prime contractor might not keep up to time. In the Crook case "the contract," as the Court said, "showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time." We cannot twist this statement into reading: "by the Government, which might not keep up to time."

In the case we have here the Government of course might not keep up to time, but the time the Government was to keep up to was the time of 120 days, fixed by the Government itself, and when the Government failed to "keep up to time," it necessarily breached its contract.

Under the circumstances we must conclude that the limitation of 120 days had not the provisional character found to exist in the Crook case; that it was therefore an obligation of the Government, party to the contract, to make performance within 120 days possible. Part of the agreed performance by the Government was to make the performance required of the plaintiff possible. The Government failed in such performance and must respond in damages for the breach.

United States v. Rice, reported 317 U. S. 61, was taken for review by the Supreme Court for alleged conflict with the Crook case. In the Rice case the respondent was the plumbing, heating, and electrical contractor, following up the principal contract of construction. There, as in the Crook case, there was a prime contract, as there is not here. The Court held that the time for performance of the follow-up contract was provisional, as in the Crook case, and stated:

"If there are rights to recover damages where the Government *exercises its reserved power to delay*, they must be found in the particular provisions fixing the rights of the parties." [Italics supplied.]

The delay the Court referred to was delay "incident to the permitted changes."

In the case now presented there were no changes, and any supposed power given to delay on account of changes was not only not exercised, but could not have been exercised, because there was no prime contract in existence giving that power.

The reason given therefore in the Crook and Rice cases, for construing the time limitation in a follow-up contract as not binding upon the Government, is absent in the present case. There is here only one contract in issue, a contract that followed up the Government's work directly, that did not follow up the work of another or prime contractor.

It may be noted that the commissioner who reported on the case concluded, with respect to certain extra expenses, that there was no way from the record of determining their reasonable amount. The plaintiff excepts to this and suggests a "jury verdict" fixing the amount. But there must be some guide even for a jury verdict, it must not be based on speculation, and the proponent is not without obligation to proffer this guide, even though its adoption might tend to decrease the amount sued for. See Owen, trustee v. United States, 80 C. Cls. 249, 256.

31 The plaintiff also claims 10 percent for overhead on an item of $6,393.69, made up of $5,996.65 for payroll of supervisory employees and $397.04 for compensation insurance, etc. Supervision is overhead, as distinguished from direct labor, and we are satisfied that an additional 10 percent is improper.

Judgment will be limited to $6,393.69. The plaintiff is entitled to recovery of that amount and entry of judgment will be made accordingly. It is so ordered.

JONES, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

MADDEN, Judge, took no part in the decision of this case.

NOTE.—The contract and specifications made a part of these findings by reference accompany this record under separate cover.

33 *Judgment*

At a Court of Claims held in the City of Washington on the 3d day of December A. D., 1945, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,393.69.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand three hundred ninety-three dollars and sixty-nine cents ($6,393.69).

35 [Clerk's certificate to foregoing transcript omitted in printing.]

36 In the Supreme Court of the United States

Stipulation not to print exhibits

It is hereby stipulated by and between counsel for the parties in the above-entitled cause that Exhibits 1 and 2 filed by respondent in the Court of Claims (consisting of the contract between petitioner and respondent dated June 27, 1940, and the specifications referred to therein) which are part of the record of said cause in said court and which by reference (Fdg. 2) are made part of the Special Findings of Fact of said court need not be printed as part of the record of the above-entitled cause in this Court but shall nevertheless be considered a part of the record and may be referred to by the Court and by counsel in the briefs and on oral argument.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.
Alexander M. Heron,
ALEXANDER M. HERON,
Counsel for Respondent.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

Order allowing certiorari

Filed April 22, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 1 1946
CHARLES ELMORE CROPLEY

No. 902 50

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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6 Williston, *Contracts* (rev. ed., 1938), § 1964	13, 15

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 902

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on December 3, 1945.

OPINION BELOW

The opinion of the Court of Claims (R. 16–20) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 3, 1945 (R. 20). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether under the standard form of Government construction contract the Government is liable in damages to the contractor where the contractor is unable to complete performance within the time specified in the contract due to the Government's inability, despite its skill and diligence, to have the site completely ready for the contractor within that time, and where the delay was due to unforeseeable causes.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 17–20.

STATEMENT

This is a suit to recover from the United States damages claimed to be due to delays in the performance of a Government contract (R. 1–2). The facts, as found by the Court of Claims (R. 9–16), are as follows:

On June 27, 1940, respondent, an electrical contractor, engaged in business in Washington, D. C. (Fdg. 1; R. 9), entered into a contract with the United States on standard form Government contract No. 23 to furnish the materials for and construct a field lighting system for the Washington National Airport, Gravelly Point, Virginia, at the contract price of $187,000 (Fdg. 2; R. 9, 1, 3). The work was to be "commenced as soon as practicable" and "completed within one hundred

twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 17). Notice to proceed was received by respondent on July 15, 1940 (Fdg. 2; R. 9) and respondent did not complete performance until April 18, 1941 (Fdgs. 3, 4; R. 10, 12).

The site of the Airport was "created" by hydraulic dredging and the Government sought to achieve, in less than one year, a degree of site stabilization which would ordinarily require four or five years (Fdg. 5; R. 14). "Pockets of unsatisfactory material were found" in the materials deposited on the runway sites by the dredges and these "had to be replaced with satisfactory material" (Fdg. 5; R. 15). Other substitutions of materials also had to be made "in order to achieve the necessary compaction" (Fdg. 5; R. 15). Respondent's work could not be done before the runways were paved. "When an area had been properly filled, graded and surfaced, it was released" to respondent for the "work pertaining to its contract in that area" (Fdg. 5; R. 15). Because of "a lack of uniformity in the material deposited" by the dredges, "the areas were not * * * ready for delivery to [respondent] except in detachments" and "there was a marked lack of continuity in [respondent's] work due to the scattered deliveries thus made" (Fdg. 5; R. 15). "The length of time taken to make the fill, stabilize the material, do the grading and

paving, was not anticipated by the [Government's] engineers. They were skillful and diligent in their work, and released areas to the [respondent] as fast as they were able to do so" (Fdg. 5; R. 15, 17).

Respondent complained to the appropriate Government officers regarding the delays thus encountered (Fdg. 4; R. 10, 12). On December 20, 1940, the contracting officer made, *inter alia*, the following findings of fact:

> Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. * * * (Fdg. 4; R. 10–12.)

The contracting officer accordingly found that respondent was entitled to "an extension of contract time" and extended its time 79 days (Fdg. 4; R. 11–12). On May 17, 1941, after respondent's work was completed (Fdg. 3; R. 10), the contracting officer made similar findings of fact and granted respondent an additional 78-day extension of time (Fdg. 4; 12–14). The extensions thus granted extended the time for respondent's performance to the date on which respondent completed performance (Fdgs. 3, 4; R. 10, 12–14).

Respondent was paid the contract price as adjusted by change orders (Fdg. 3; R. 10) and no liquidated damages for delay were charged against or collected from it (Fdg. 4; R. 14).

On August 19, 1942, respondent brought this suit in the Court of Claims (R. 1–3), alleging that it had incurred increased costs [1] due to the 157-day period beyond the original contract time over which it was required to extend its performance (R. 2). The Court of Claims held that the contract period of 120 days was "an obligation of the Government * * * to make performance within

[1] "Additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and * * * additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces * * * together with an additional general overhead * * *" (R. 2).

120 days possible. * * * The Government failed in such performance and must respond in damages for the breach" (R. 19). The court entered judgment for the respondent in the amount of $6,393.69 (R. 16, 20).[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Government, by specifying that the work under the contract was to be completed within 120 days, assumed the obligation of making performance within 120 days possible.

2. In holding the Government liable in damages to the contractor for delays in the ultimate completion of the job.

3. In holding that the contractor could recover damages for delays in the ultimate completion of the job, in addition to extensions of time granted the contractor by the contracting officer pursuant

[2] Damages allowed comprised the "pay roll of supervisory employees for the extent of delay" and compensation and liability insurance and taxes on such pay roll (Fdg. 6; R. 15). Other damages claimed by respondent, including the "reasonable rental values" of certain of respondent's equipment which respondent was required to keep on the site of the work during the extended period (Fdg. 6; R. 16), were disallowed as not properly or sufficiently proved. Cf. *Henry Ericsson Company* v. *United States*, C. Cls. No. 44614, decided October 1, 1945, certiorari denied March 4, 1946, No. 701, this Term; *B–W Construction Company* v. *United States*, C. Cls. No. 43915, decided November 5, 1945, certiorari denied March 4, 1946, No. 748, this Term.

to Article 9 of the standard form of Government construction contract (*infra*, p. 18).

4. In failing to follow the decisions of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, with respect to liability for such delays.

5. In holding the Government responsible for delays even though "the Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them" (Fdg. 5; R. 17, 15).

6. In holding that the delays were not due to unforeseeable causes, within the meaning of Article 9 of the standard form of Government construction contract (*infra*, p. 18).

7. In failing to accord finality to the findings of fact of the contracting officer (Fdg. 4; R. 10-14) that the delays were due to unforeseeable causes.

8. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. In the instant case, respondent was required by its contract to complete performance within 120 days after notice to proceed (Fdg. 2; R. 9, 3; *infra*, p. 17). Completion within that time was rendered impossible by delays which occurred in constructing the Airport site (Fdgs. 4, 5; R. 11–15). These delays were unavoidable, both by respondent and, as the court below found, by the Gov-

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ernment (Fdgs. 4, 5; R. 11, 13–15, 17). Respondent was granted adequate extensions of time, as provided in Article 9 of its contract (*infra*, p. 18). The court below held that by specifying a contract completion time of 120 days, the Government became obligated "to make performance within 120 days possible" (R. 19); that its failure to make performance possible within this time was a breach of contract; and that the Government "must respond in damages for the breach" (R. 19). We submit that the decision below is in direct conflict with *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61.[3]

In *Crook Co.* v. *United States*, 270 U. S. 4, Crook contracted with the Government to install heating systems in two buildings under construction. Completion by Crook of his work within the period specified in his contract was rendered impossible by delays in the construction of the buildings. This Court held that the delays were unavoidable so far as both Crook and the Government were concerned and that Crook could not recover damages in addition to the extension of time granted to him on account of such delays.

[3] See also *United States* v. *Blair*, 321 U. S. 730. The disposition of the court below to disregard the principles of the *Crook*, *Rice*, and *Blair* cases was also challenged by the Government in No. 701, this Term, *United States* v. *Henry Ericsson Company*, and No. 748, this Term, *United States* v. *B–W Construction Company*, both petitions for writs of certiorari denied March 4, 1946.

Thereafter, this Court, on the petition of the Government, granted certiorari in a similar case, *United States* v. *Rice*, 316 U. S. 653, "to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract" in the *Crook* case. *United States* v. *Rice*, 317 U. S. 61, 62. In that case, this Court held the Government not liable for damages resulting from the delay caused by necessary changes in plans and repeated the principle of the *Crook* case that "it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *United States* v. *Rice*, 317 U. S. 61, 65; *Crook Co.* v. *United States*, 270 U. S. 4, 6.

The attempt of the court below (R. 18–20) to distinguish this case from the *Crook* and *Rice* cases is, it is submitted, baseless. That the delays in those cases may have been due to changes[*] required by the Government, which changes were specifically provided for in the contracts, would not affect the principle of the *Crook* case, stated by this Court to be that (270 U. S. at 6):

[*] That the delay in the *Crook* case was due to "changes", as assumed by the court below, is open to question. See 59 C. Cls. 593.

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do.

Nor would it affect the principle of the *Rice* case that "contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time." 317 U. S. at 65. See also *Chouteau* v. *United States*, 95 U. S. 61.

Moreover, it would appear to be immaterial, from the standpoint of the application of those principles, whether the contractor whose work was delayed was delayed by the work of another contractor or by the work, as here, of the Government done on force account (Fdg. 4; R. 11–13), particularly where, as here, there was no fault on the part of the Government but, on the contrary, "the Government's representatives and operating force acted with great, if not unusual, diligence" (Fdg.

5; R. 17, 15).[5] As in the *Rice* case "Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work" (317 U. S. at 65), so the respondent in the instant case was required to adjust its work to "the paving of the runways and taxiways * * * the rough grading of the shoulders * * * by the Government" and knew that until that work was completed the site would not "be released to this Contractor for work under this contract." Section 5–2 of the specifications; Fdg. 2; R. 9–10; *infra,*

[5] The only fault attributed to the Government by the court below was the establishment of the 120-day period in the contract, which the court below described as a "mistaken calculation" (R. 17). Whether this is so is problematical in view of the contracting officer's finding that 120 days was "a reasonable time for completion of the contract under ordinary circumstances" and the court's own finding that "no evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 13–14). However, if the 120-day period was a miscalculation, it resulted from mutual mistake and not merely from that of the Government since the respondent, of course, agreed to it. Moreover, such agreement by respondent must be read in the light of Section 3–16 of the specifications (Fdg. 2; R. 9; *infra*, p. 19) which provides:

"It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract."

pp. 19–20. Cf. Section 3–25 of the specifications; Fdg. 2; R. 9; *infra*, p. 19.

A fair reading of the contract here involved imposes liability upon the Government for the delays here suffered by respondent only to the extent of requiring the Government to excuse respondent from performance within the original contract time. This Court so held in the *Rice* case, when it said (317 U. S. at 69) with respect to the delay that "the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. *Under the terms of the contract, it is entitled to no more.*" [Italics supplied.] Article 1 of the contract (*infra*, p. 17) fixed the time "very strictly" for performance by respondent. Cf. *Crook Co.* v. *United States*, 270 U. S. 4, 6. Article 9 (*infra*, pp. 17–19) provided that if respondent failed to complete the work within the time thus set, the Government was entitled to terminate the contract or to require the payment of liquidated damages. Neither in Article 1 nor in Article 9 is there to be found any express promise or any basis for implying a warranty by the Government as to the time within which performance could be completed, which would be the only basis on which the decision below could be supported. To the contrary, Article 9 expressly provides merely that the contractor shall not be liable for liquidated damages because of "acts of the Government," a provision which strongly suggests that the Gov-

ernment's liability is to be limited accordingly. Indeed, it is well settled that in the absence of an express agreement to the contrary a contractor is liable for breach of contract as a result of delay caused by even unanticipated difficulties. *Maryland Dredging Co.* v. *United States,* 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938), §1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States,* 245 U. S. 159. The decision below, however, attempts precisely this—to turn respondent's duty to perform within 120 days into the Government's warranty that it would be able to do so. We submit accordingly that respondent, having had its time extended under Article 9 (Fdg. 4; R. 11–14) and having been paid the full contract price (Fdg. 3; R. 10), "is entitled to nothing more." *Crook Co.* v. *United States,* 270 U. S. 4, 7.

The court below considered Article 9 inapplicable because its proviso relates to extensions of time for delays due to "unforeseeable" causes while, according to the court below, the difficulties in erecting and stabilizing the runways were not "unforeseeable" but merely "unforeseen" (R. 17). In so holding, the court below disregarded the contracting officer's findings of fact that the causes of delay were "unforeseeable" (Fdg. 4;

11–14,[6] despite the Court's own finding that "no evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 14).[7] Not only the contracting officer,

[6] The contracting officer also used the term "unforeseen", but it is clear from his findings as a whole that he used it in the sense of "unforeseeable" as that term is used in Article 9 of the contract. In his findings of May 17, 1941, the contracting officer specifically stated that respondent was "delayed * * * due to excusable causes as contemplated by the contract provisions" and granted respondent an extension of 78 days "due to unforeseeable causes of delay beyond your control and without your fault or negligence." Compare the language of Article 9, *infra*, p. 18.

The contracting officer was not alone in using "unforeseen" in the sense of "unforeseeable" as that term is used in Article 9. The court below has not always been as meticulous in its distinctions between the two words as its opinion in the instant case (R. 17) would indicate. See *H. B. Nelson Construction Co.* v. *United States*, 87 Ct. Cls. 375, certiorari denied, 306 U. S. 661, in which the Court of Claims, in dealing with an "unforeseeable" clause such as that here involved (87 Ct. Cls. at 386), repeatedly referred to "an unforeseen cause of delay for which the contractor is not responsible under Article 9"; "unforeseen delays excusable under Article 9"; "an unforeseen cause of delay under Article 9". See 87 Ct. Cls. at 389–390.

[7] It is submitted that even had such evidence been proffered the contracting officer's findings of fact would have been conclusive in view of the provision in Article 9 that his findings of fact "shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the

but also the respondent acted throughout on the assumption that the delays were such as came within the proviso to Article 9. Respondent complied with the procedure established by Article 9 for keeping the contracting officer notified with respect to delays (Fdg. 4; R. 10, 12) and it accepted the first extension of time granted by the contracting officer and thereafter applied for and accepted an additional extension (Fdg. 4; R. 10–14).[8] We submit that respondent, having had advantage of Article 9, cannot now complain that the delays were not within the contemplation of that Article.

2. The question presented is important. The large number of construction contracts entered into by the United States continue to present questions of liability for delay. While this Court, in the *Crook*, *Rice*, and *Blair* cases, *supra*, enunciated principles which, it is submitted, govern this case and require reversal of the judgment

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parties hereto". Cf. Article 15 (R. 7). *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *United States* v. *Gleason*, 175 U. S. 588; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553.

[8] If the delays were not within the contemplation of the proviso to Article 9, there was no authority in the contracting officer to grant the extensions and respondent would have been liable to the Government for liquidated damages in the amount of $15,700 (Fdgs. 3, 4; R. 10–12). *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938), § 1964.

below, the court below has shown a continued disposition, recognized by this Court in the *Rice* case, to disregard those principles. A further ruling by this Court as to their applicability is desirable.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

APPENDIX

CONTRACT

ARTICLE 1. * * * The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

* * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the

Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of

delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

* * * * *

SPECIFICATIONS

3–16. *Knowledge of Conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

* * * * *

3–25. *Cooperation.*—The Contractor shall cooperate with other Contractors and Government agencies doing construction work at the site and shall employ such methods and means in executing his work so as not to interfere with or cause any interruption to the work being installed by such Government agencies or by any other Contractor or public utilities company. The Contractor shall execute his work in such a manner and serve notices in ample time as to afford the other Contractors and agencies operating on the site to coordinate their work with the work under this contract.

* * * * *

5–2. As the paving of the runways and taxiways is completed, the rough grading of the shoulders

will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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No. 50

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 16–20) is reported in 63 F. Supp. 209.

JURISDICTION

The judgment of the Court of Claims was entered on December 3, 1945 (R. 20). The petition for a writ of certiorari was filed on March 1, 1946, and was granted on April 22, 1946 (R. 22). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, under the standard form of Government construction contract, the Government is liable in damages to the contractor when the contractor is unable to complete performance within the time specified in the contract due to the Government's inability, despite its skill and diligence, to have the site completely ready for the contractor within that time, and when the delay was due to unforeseeable causes.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set out in the Appendix, *infra*, pp. 28–32.

STATEMENT

This is a suit to recover from the United States damages claimed to be due to delays in the performance of a Government contract (R. 1–2). The facts, as found by the Court of Claims (R. 9–16), are as follows:

On June 27, 1940, respondent, an electrical contractor, engaged in business in Washington, D. C. (Fdg. 1; R. 9), entered into a contract with the United States, on standard form Government contract No. 23, to furnish the materials and to construct a field lighting system for the Washington National Airport, Gravelly Point, Virginia, at the contract price of $187,000 (Fdg. 2; R. 9, 1, 3).

The work was to be "commenced as soon as practicable" and "completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 28). Notice to proceed was received by respondent on July 15, 1940 (Fdg. 2; R. 9) but performance was not completed until April 18, 1941 (Fdgs. 3, 4; R. 10, 12).

The site of the Airport was "created" by hydraulic dredging and the Government sought to achieve, in less than one year, a degree of site stabilization which would ordinarily require four or five years (Fdg. 5; R. 14). "Pockets of unsatisfactory material were found" in the materials deposited on the runway sites by the dredges and these "had to be replaced with satisfactory material" (Fdg. 5; R. 15). Other substitutions of materials also had to be made "in order to achieve the necessary compaction" (Fdg. 5; R. 15). Respondent's work could not be done before the runways were paved. "When an area had been properly filled, graded and surfaced, it was released" to respondent for the "work pertaining to its contract in that area" (Fdg. 5; R. 15). Because of "a lack of uniformity in the material deposited" by the dredges, "the areas were not * * * ready for delivery to [respondent] except in detachments" and "there was a marked lack of continuity in [respondent's] work due to the scattered deliveries thus made" (Fdg.

5; R. 15). "The length of time taken to make the fill, stabilize the material, do the grading and paving, was not anticipated by the [Government's] engineers. They were skillful and diligent in their work, and released areas to the [respondent] as fast as they were able to do so" (Fdg. 5; R. 15, 17).

Respondent complained to the Government's resident engineer regarding the delays thus encountered, and, on September 3, 1940, asked the contracting officer for an extension of time of performance "and adjustment for additional overhead and expense" (Fdg. 4; R. 10, 12). On September 23, 1940, the contracting officer replied, instructing respondent to keep him and the resident engineer "currently informed as to all matters of delay, and stating that upon completion of the work, consideration would be given to an appropriate extension of time" (Fdg. 4; R. 10). On December 20, 1940, the contracting officer made, *inter alia*, the following findings of fact (Fdg. 4; R. 10–12):

> Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your

> work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. * * *

The contracting officer accordingly found that respondent was entitled to "an extension of contract time" and extended its time 79 days (Fdg. 4; R. 11–12). On May 17, 1941, after respondent's work was completed (Fdg. 3; R. 10), and pursuant to respondent's request for a further extension of time for performance (Fdg. 4; R. 12), the contracting officer made similar findings of fact and granted respondent an additional 78-day extension of time (Fdg. 4; R. 12–14). The extensions thus granted extended the time for respondent's performance to the date on which respondent completed performance (Fdgs. 3, 4; R. 10, 12–14).

Respondent was paid the contract price as adjusted by change orders (Fdg. 3; R. 10) and no

liquidated damages for delay were charged against or collected from it (Fdg. 4; R. 14).

In August 1941, respondent "filed a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays", which claim was denied "for lack of jurisdiction" (Fdg. 7; R. 16).

On August 19, 1942, respondent brought this suit in the Court of Claims (R. 1–3), alleging that it had incurred increased costs[1] due to the 157-day period beyond the original contract time over which its performance was extended (R. 2). The Court of Claims held that the 120-day limitation was "an obligation of the Government * * * to make performance within 120 days possible. * * * The Government failed in such performance and must respond in damages for the breach" (R. 19). The court entered judgment for the respondent in the amount of $6,393.69 (R. 16, 20).[2]

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[1] "Additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and * * * additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces * * * together with an additional general overhead * * *" (R. 2).

[2] Damages allowed comprised the "pay roll of supervisory employees for the extent of delay" and compensation and liability insurance and taxes on such payroll (Fdg. 6; R. 15). Other damages claimed by respondent were disallowed as not sufficiently proved (Fdg. 6; R. 15–16, 20).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Government, by specifying that the work under the contract was to be completed within 120 days, assumed the obligation of making performance within 120 days possible.

2. In holding the Government liable in damages to the contractor for delays in the ultimate completion of the job.

3. In holding that the contractor could recover damages for delays in the ultimate completion of the job, in addition to e nsions of time granted the contractor by the contracting officer pursuant to Article 9 of the standard form of Government construction contract (*infra*, pp. 29–31).

4. In failing to follow the decisions of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, with respect to liability for such delays.

5. In holding the Government responsible for delays even though "the Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them" (Fdg. 5; R. 17, 15).

6. In holding that the delays were not due to unforeseeable causes, within the meaning of Article 9 of the standard form of Government construction contract (*infra*, pp. 29–31).

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7. In failing to accord finality to the findings of fact of the contracting officer (Fdg. 4; R. 10–14) that the delays were due to unforeseeable causes.

8. In entering judgment for respondent.

SUMMARY OF ARGUMENT

Because the contract here, like the contracts in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, neither expressly nor impliedly imposed upon the Government an obligation to make timely performance possible, the contractor is not entitled to damages attendant upon the delay. When the contractor received its extensions of time, provision for which is made by Article 9 of the contract when there is a delay due to "unforeseeable causes," and was thereby relieved of the liquidated damages which could otherwise have been imposed, it received all the relief to which it was entitled. What the court below did was to convert the respondent's duty to perform within 120 days into a Government warranty that it would be possible to do so.

The *Crook Co.* and *Rice* cases cannot be successfully distinguished from the case at bar. Whether the delay results from a failure of a prime contractor to prepare the site or from the inability of the Government to do so is immaterial, when the Government acts, as it did here, with "great, if not unusual diligence." The de-

lay here, like that in the *Rice* case, resulted from unexpected soil conditions, and gave rise to no right in the contractor to recover damages.

In holding that the conditions that caused the delay were "unforeseen" but not "unforeseeable" within the meaning of Article 9 of the contract, and that that Article, therefore, had no application to this case, the court below plainly misread the contracting officer's findings. The respondent itself acquiesced in the findings that the conditions were unforeseeable and was excused from the payment of liquidated damages as a result of those findings. They were binding on the parties and on the court.

Even if the conditions causing the delay were foreseeable, and could, despite the unappealed contrary findings of the contracting officer, be so treated by the court below, the judgment below was erroneous because the specifications in the contract required the contractor to satisfy itself in advance as to all matters which could affect the work under the contract. If there was a negligent failure to foresee the soil difficulties, the contractor assumed the responsibility for such failure. Moreover, the judgment below cannot be rested on the theory that the Government's notice to proceed was premature. The court below did not so find and, even if it was premature, the burden was on the contractor, under the specifications, to call that fact to the attention of the

Government. Having failed to do so, it must be deemed to have acquiesced.

ARGUMENT

THE GOVERNMENT WAS NOT OBLIGATED, UNDER ITS CONTRACT, TO MAKE PERFORMANCE BY RESPONDENT POSSIBLE WITHIN THE TIME PROVIDED BY THE CONTRACT FOR SUCH PERFORMANCE, AND WAS NOT LIABLE IN DAMAGES FOR ITS FAILURE TO DO SO

Respondent was required by its contract to complete performance within 120 days after notice to proceed (Fdg. 2; R. 9, 3; *infra*, p. 28). Completion within that time was rendered impossible by delays which occurred in constructing the Airport site (Fdgs. 4, 5; R. 11–15). As the court below found, these delays were unavoidable both by respondent and by the Government (Fdgs. 4, 5; R. 11, 13–15, 17). Respondent requested (Fdg. 4; R. 10, 12) and, the delays having been found by the contracting officer to be "due to unforeseeable causes" (Fdg. 4; R. 11–14), was granted adequate extensions of time as provided in Article 9 of its contract (Fdg. 4; R. 11–14, 5–6; *infra*, pp. 29–31). The court below held that the Government became obligated to make performance by respondent possible within the 120-day period provided by the contract for such performance; that its failure to make performance possible within that time was a breach of contract;[3] and that the Government "must respond

[3] The respondent is indulging in pure verbalism when it charges (Br. in Opp. 3) that the Government has misread the opinion of the court below. It states that the court did

in damages for the breach" (R. 19). In so holding, we submit that the court below erred.

A. *The Government assumed no obligation to make performance within 120 days possible.*—The two provisions of the contract principally involved are Article 1, which provided that respondent's work was to "be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 28), and Article 9 (R. 5–6; *infra*, pp. 29–31), which provided that if respondent failed to complete the work within the time set by Article 1, the Government could terminate the contract or require the payment of liquidated damages (R. 5; *infra*, pp. 29–30). Article 9 provided further (R. 5–6; *infra*, pp. 30–31):

> That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not re-

not hold that the Government was obliged to make performance within 120 days possible but rather that the Government "had the obligation of not making it *impossible* for the contractor to complete its work in the contract time by failing to carry out those parts of its obligation which were both necessary and preliminary to the contractor's work." But this is to say, in effect, only that the Government is liable for failing not to make timely performance impossible—a somewhat cruder manner of saying that the Government is liable for failing to make timely performance possible.

> stricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, * * * if the contractor shall * * * notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Such provisions are not novel to this Court. *Crook Co.* v. *United States,* 270 U. S. 4; *United States* v. *Rice,* 317 U. S. 61; *United States* v. *Blair,* 321 U. S. 730. And the decisions of this Court in the first two cited cases patently bar the respondent's claim here.

In the first case, the Crook Company contracted with the Government to install heating systems in two buildings under construction. Completion by the Crook Company of its work within the period specified in its contract was rendered impossible by delays on the part of the general contractors engaged in the construction of the buildings. This

Court held that the delays were unavoidable so far as both the Company and the Government were concerned, and that the Crook Company had no additional remedy by way of damages when it had been granted an extension of time on account of such delays. Thereafter, this Court, on the petition of the Government, granted certiorari in the *Rice* case, 316 U. S. 653, "to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract" in the *Crook Co.* case. *United States* v. *Rice*, 317 U. S. 61, 62. In that case, this Court held the Government not liable to the respondent engineering company for damages resulting from the delay caused by the Government's changes in the plans of the general contractor—changes resulting from unexpected soil conditions; the court there repeated the principle of the *Crook Co.* case that "it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *United States* v. *Rice*, 317 U. S. 61, 65; *Crook Co.* v. *United States*, 270 U. S. 4, 6.

Article 1 of the contract here involved (R. 3; *infra*, p. 28) fixed the time "very strictly" for

performance by respondent. Cf. *Crook Co.* v. *United States*, 270 U. S. 4, 6. Article 9 (R. 5–6; *infra*, pp. 29–31) provided that if respondent failed to complete the work within the time thus set, the Government was entitled to terminate the contract or to require the payment of liquidated damages. Neither in Article 1 nor in Article 9 is there to be found any express promise or any basis for implying a warranty by the Government as to the time within which performance could be completed; this would be the only ground on which the decision below could be supported. On the contrary, Article 9 expressly provides merely that the contractor shall not be liable for liquidated damages because of "acts of the Government," a provision which strongly suggests that the Government's liability is to be limited accordingly. Indeed, it is well settled that, in the absence of an express agreement to the contrary, a contractor is liable for breach of contract as a result of delay caused by even unanticipated difficulties. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; *Restatement of Contracts*, sec. 467; 6 Williston, *Contracts* (rev. ed., 1938), sec. 1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States*, 245 U. S. 159. The decision below, however, attempts precisely this—

to turn respondent's duty to perform within 120 days into the Government's warranty that it would be possible to do so. Respondent, having had its time extended under Article 9 (Fdg. 4; R. 11–14) and having been paid the full contract price (Fdg. 3; R. 10), "is entitled to nothing more." *Crook Co.* v. *United States*, 270 U. S. 4, 7; *United States* v. *Rice*, 317 U. S. 61, 69.

B. *The distinction drawn by the court below between the* Crook Co. *and* Rice *cases and this case are insubstantial.*—Contrary to the decisions of this Court, the court below read into the instant contract an undertaking on the part of the Government which is neither expressed in the contract nor present by implication. It sought to distinguish this case from the *Crook Co.* and *Rice* cases on the grounds that the delays in those cases resulted from changes, required by the Government, which were specifically provided for in the contracts (R. 18–20);[4] that in those cases, "the basic work of construction was being done by another contractor [which] brought the provision for changes into play" (R. 18); that in the instant case, grading of the Airport site was done by the Government's own employees on "force account" and not through a contractor; and that "the Government does not order itself to make changes"

[4] That the delay in the *Crook* case was due to "changes," as the court below appears to have assumed, is open to question. See 59 C. Cls 593.

(R. 18). These attempted distinctions are baseless. That the delays in the *Crook Co.* and *Rice* cases may have been due to changes would not affect the principle of the *Crook Co.* case, stated by this Court to be that (270 U. S. at 6):

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do.

Nor would it affect the principle of the *Rice* case that "contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time." 317 U. S. at 65. See also *Chouteau* v. *United States*, 95 U. S. 61.

Indeed, this Court referred, in both the *Crook Co.* and *Rice* cases, to the "change order" provisions in the contracts only as indications that, so far as the Government was concerned, the completion time specified in the contract was "pro-

visional". 270 U. S. at 6; 317 U. S. at 65. It was not the fact that changes were made, but the reservation of the power to make changes which the Court thought significant.[a] Since the contract here involved also contains a reservation of authority to "make changes in the drawings and/or specifications of this contract and within the general scope thereof" (Article 3 of the contract, R. 4, *infra*, pp. 28–29) and to make changes in the contract upon discovery of "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications" (Article 4 of the contract, R. 4–5, *infra*, p. 29; cf. 317 U. S. at 65–66), one reason supporting the judgment of the court below disappears.

It would appear to be immaterial, moreover, whether the contractor was delayed by the work of another contractor or by the work of the Government done on force account (Fdg. 4; R. 11–13). This is particularly so where, as here, the Government's delay resulted from unforeseen soil conditions, also the operative cause of the delay in the *Rice* case. It would appear to be immaterial also whether the delay is caused by the Government as an incident to its contractual authority to make changes in the prime construction contract, as in the *Rice* case, or as an incident to its own performance of the basic construction work. Delays are as likely to occur and to be within the contemplation of the parties in the one case as in

the other. Indeed, the principles of the *Rice* and *Crook* cases are particularly applicable where, as here, "the Government's representatives and operating force acted with great, if not unusual, diligence" (Fdg. 5; R. 17, 15). Just as the respondent in the *Rice* case "was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work" (317 U. S. at 65), so the respondent in the instant case was required to adjust its work to "the paving of the runways and taxiways * * * the rough grading of the shoulders * * * by the Government" and knew that until that work was completed the site would not "be released to this Contractor for work under this contract." Section 5–2 of the specifications; Fdg. 2; R. 9–10; *infra*, p. 32. Cf. Section 3–25 of the specifications; Fdg. 2; R. 9, *infra*, pp. 31–32.

The instant contract imposed liability upon the Government for the delays suffered by respondent only to the extent of requiring the Government to excuse respondent from performance within the original contract time. This Court so held in the *Rice* case, when it said (317 U. S. at 69), with respect to the delay, that "the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. *Under the terms of the contract, it is entitled to no more.*" [Italics supplied.] But the

court below appears to have proceeded upon the theory that if the Government was not required by the contract to make possible respondent's performance within the 120 days, the Government would have had "an unlimited time for performance" (R. 18). This case, however, presents no question of "unlimited time for performance" or the equitable adjustments that might be required had the Government acted wilfully or maliciously. As found by the court below, the Government's representatives "were skillful and diligent in their work, and released areas to [respondent] as fast as they were able to do so" (Fdg. 5; R. 15). To the extent that the Government and, therefore, the respondent were delayed, the Government granted extensions of time to the respondent in which to complete performance, thereby excusing it from payment of liquidated damages under Article 9 of the contract.

C. *The conditions causing the delay were unforeseeable within the meaning of Article 9.*— Article 9 deals with delays due to "unforeseeable" conditions, and the court below held that since the contracting officer had, in his findings of fact, ascribed the delay to "unforeseen" soil conditions, Article 9 was inapplicable (R. 17). We think it plain, however, that this constituted a misconstruction of the contracting officer's findings.

The contracting officer, in making his findings of fact with respect to the extensions of time

granted respondent, did use the term "unforeseen" to describe the soil conditions which delayed the Government (Fdg. 4; R. 11, 13). But it is clear from his findings as a whole that he used it in the sense of "unforeseeable" as that term is used in Article 9 of the contract. In his findings of December 20, 1940 (Fdg. 4; R. 10–12), the contracting officer recited the provision of Article 9 that liquidated damages were not to be charged against the contractor because of delays "due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to acts of the Government" (Fdg. 4; R. 11). He then referred to the "unforeseen soil conditions" and to "such unforeseeable causes of delay", and found that respondent was "entitled to an extension of contract time commensurate with the actual delay caused you by such conditions" (Fdg. 4; R. 11). In his findings of May 17, 1941 (Fdg. 4; R. 12–14), the contracting officer referred to the extension of December 20, 1940, as one which "represented delays due to unforeseeable causes" (Fdg. 4; R. 12). He again recited the provision of Article 9 with reference to delays "due to unforeseeable causes" (Fdg. 4; R. 12), again referred to the "unforeseen soil conditions" which had delayed the Government (Fdg. 4; R. 13) and to "such unforeseeable causes of delay" (Fdg. 4; R. 13), and again found that respond-

ent was "entitled to an extension of contract time" (Fdg. 4; R. 13). In addition, in his findings of May 17, 1941, the contracting officer found that respondent had been delayed "due to excusable causes as contemplated by the contract provisions" (Fdg. 4; R. 13) and referred to the extension of time granted on that date as "due to unforeseeable causes of delay beyond your control and without your fault or negligence" (Fdg. 4; R. 14).

The only provision in the contract which authorized the contracting officer to grant extensions of time was to be found in Article 9. If the delays in completion of performance were not within the purview of the proviso to that Article, there was not only no authority in the contracting officer to grant the extensions but, on the contrary, respondent would have been liable to the Government for liquidated damages in the amount of $15,700 (Fdgs. 3, 4; R. 10–12). *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, Sec. 467; 6 Williston, *Contracts* (rev. ed., 1938), Sec. 1964. It is clear beyond dispute that the contracting officer, in granting the extensions, acted within the purview of Article 9 and, that by such action as well as by the very words he used and references he made to the provisions of Article 9, found that the delays were due to "unforeseeable" causes as that term is used in that Article.

The court below found that "No evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 14). Aside from the question of whether such evidence was proffered, however, the contracting officer's findings that the delays were due to unforeseeable causes were conclusive upon the parties and the courts in view of the provision to that effect in Article 9 (*Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185; *Ripley* v. *United States*, 223 U. S. 695, 704; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *United States* v. *McShain*, 308 U. S. 512, 520–521) and in view of respondent's failure to appeal from such findings (R. 6, 2). *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Callahan Walker Co.*, 317 U. S. 56. The court below was therefore bound by the contracting officer's findings that the delays were due to unforeseeable causes.[5]

[5] While the court below placed great reliance (R. 17) upon the contracting officer's use of the term "unforeseen," rather than the contractural term "unforeseeable," to describe the

Not only the contracting officer but also the respondent itself acted throughout on the basis that the delays in question were within the purview of the proviso to Article 9—delays due to unforeseeable causes.[6] As noted above, it did not appeal from the contracting officer's findings that the delays were unforeseeable. And long after the expiration of the 30-day appeal period provided by Articles 9 and 15 of the contract (R. 6, 7, 10, 12; *infra;* p. 31) it filed, as the court below found, "a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays" (Fdg. 7; R. 16).[7] From the very outset, respondent complied with the procedure established by Article 9 for keeping the contracting officer notified with respect to delays (Fdg. 4; R. 5, 6, 10, 12). It sought extensions of time and accepted those

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soil conditions which caused the delays, that court itself, in *H. B. Nelson Construction Co.* v. *United States*, 87 Ct. Cls. 375, certiorari denied, 306 U. S. 661, dealt with an "unforeseeable" clause such as that here involved (87 Ct. Cls. at 386) by repeatedly referring to "an unforeseen cause of delay for which the contractor is not responsible under Article 9"; "unforeseen delays excusable under Article 9"; and "an unforeseen cause of delay under Article 9." See 87 Ct. Cls. at 389–390.

[6] Compare the language used by respondent in its Brief in Opposition, p. 2, in which it describes the delays as "inexcusable."

[7] The court below found that this claim was denied "for lack of jurisdiction" (Fdg. 7; R. 16)—presumably because it was untimely.

granted by the contracting officer (Fdg. 4; R. 10–14), thereby being excused from the payment of liquidated damages. Having had the advantage of Article 9, respondent cannot now complain that the delays were not within the contemplation of that Article.

Nor can the judgment below be rested on the only fault attributed to the Government by the court below—the establishment of the 120-day period, which the court below described as "a mistaken calculation" (R. 17). This characterization amounts to nothing more than another way of saying that the conditions leading to the delay were foreseeable, for if fault there was, it lay only in the failure to foresee that the 120-day limitation was too short—a fact that the court below thought foreseeable. Whether cast in one form or the other, the statement, for the reasons outlined above, is erroneous. Moreover, the court made no finding that this was a mistaken calculation (cf. *United States* v. *Esnault-Pelterie*, 299 U. S. 201) and in view of the contrary finding of the contracting officer (Fdg. 4, R. 13), it could not have done so. See cases cited, *supra*, p. 22.

D. *Under Section 3–16 of the specifications in the contract, the contractor assumed the risk of damages attendant upon the delay resulting from the soil conditions.*—If, despite the clear purport of the unappealed findings of the contracting officer, the soil conditions leading to the delay could be

characterized as foreseeable, the judgment of the court below is nevertheless erroneous. Section 3–16 of the specifications provides that (Fdg. 2; R. 9, *infra*, p. 31):

> It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

The negligent failure to foresee the soil difficulties, if such it was, was respondent's failure as well as that of the Government, and the specifications above-quoted plainly cast responsibility for such failure on the contractor. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, 188. It is not unreasonable to expect that a prospective contractor, who is "neither unsophisticated nor careless," would, in the light of such a provision as Section 3–16, protect itself "against such delays as are complained of by the higher price exacted for the work." *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87.

Reversal of the judgment below cannot be avoided on the theory that the Government's breach may have consisted of its premature issuance of the notice to proceed which started the

running of the 120-day period (Fdg. 2; R. 9). In the first place, the court below did not find that the notice was prematurely given; instead it found that "Immediately upon receipt of the notice to proceed the plaintiff proceeded with the work * * *" (Fdg. 3; R. 10). Moreover, there is no indication and no finding by the court below that respondent, who was familiar with the location of the work, the conditions under which the work was to be performed, and "all other matters which * * * affect the work" (Sec. 3–16 of the specifications, R. 9) raised any question with respect to the timing of the notice to proceed. By not having made timely objection and by having proceeded to work pursuant to the notice to proceed (Fdg. 3; R. 10), respondent must be taken to have acquiesced in its issuance at the time it was issued, and, in the light of Section 3–16 of the specifications, with full knowledge of the difficulties which were likely to be encountered in the performance of its work.[8]

[8] In this connection it is to be noted that when respondent did ask the contracting officer for an extension of time it also sought an "adjustment for additional overhead and expense" (Fdg. 4; R. 10). The contracting officer replied that "consideration would be given to an appropriate extension of time" (Fdg. 4; R. 10) and thereafter granted such extensions (Fdg. 4; R. 10–14). In this decision respondent also acquiesced. It took no appeal, either under Article 9 of its contract (R. 5–6; *infra*, pp. 29–31) or under Article 15 (R. 7). It appealed neither from the implied decision of the contracting officer to grant it no "adjustment for additional over-

CONCLUSION

For the reasons stated, the judgment below is erroneous and should be reversed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

A. DEVITT VANECH,
STANLEY M. SILVERBERG,
Special Assistants to the Attorney General.

PAUL A. SWEENEY,
ABRAHAM J. HARRIS,
M. M. HEUSER,
Attorneys.

AUGUST 1946.

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head and expense" (Fdg. 4; R. 10) nor from his findings upon which the extensions of time for performance were based. Cf. *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Callahan Walker Co.*, 317 U. S. 56.

APPENDIX

CONTRACT

ARTICLE 1. * * * The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

* * * * *

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon

the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor for proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been

delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting

officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

* * * * *

SPECIFICATIONS

3–16. *Knowledge of Conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

* * * * *

3–25. *Cooperation.*—The Contractor shall cooperate with other Contractors and Government agencies doing construction work at the site and

shall employ such methods and means in executing his work so as not to interfere with or cause any interruption to the work being installed by such Government agencies or by any other Contractor or public utilities company. The Contractor shall execute his work in such a manner and serve notices in ample time as to afford the other Contractors and agencies operating on the site to coordinate their work with the work under this contract.

* * * * *

5–2. As the paving of the runways and taxiways is completed, the rough grading of the shoulders will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 50

UNITED STATES, *Petitioner*,

v.

THE HOWARD P. FOLEY COMPANY, INC., a Corporation.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

ALEXANDER M. HERON,
WILLIAM L. OWEN,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 902.

UNITED STATES, *Petitioner*,

v.

THE HOWARD P. FOLEY COMPANY, INC., a Corporation.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims (R. 16-20) is not yet officially reported.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925, as amended. The judgment of the Court of Claims was entered on December 3, 1945 (R. 20).

QUESTION PRESENTED.

The question presented is whether an electrical contractor is entitled to the recovery of damages attributable to inexcusable delays occasioned to it by the Government through the latter's failure, after requiring the contractor to proceed with the work, to complete the necessary preparatory work on the site upon which the work was to be done, and as a consequence of which the contractor's performance was extended over a period of time more than double the time fixed under the terms of the contract.

STATEMENT.

The work required under the contract was fairly ordinary in character, a field lighting system for an airport (R. 3). The contract required that the work be commenced as soon as practicable and be completed within one hundred and twenty days from the date of notice to proceed (R. 3). Notice to proceed was received eighteen days after the contract was entered into (R. 9, Fdg. 2). Respondent proceeded with its work immediately upon receipt of the notice and prosecuted it to completion. (R. 10, Fdg. 3).

The Government had undertaken to construct the field itself by means of hydraulic dredging (R. 14-15, Fdg. 5; R. 11, Fdg. 4). It was attempting to effect completion of this work in one year, although it would ordinarily take from four to five years for stabilization (R. 14, Fdg. 5). Its engineers knew from the beginning that they were confronted with a problem of quick stabilization (R. 14, Fdg. 5). The length of time necessary to make the fill, stabilize the material, and do the grading and paving was not accurately anticipated by the Government's engineers (R. 15, Fdg. 5). The contracting officer, who made findings extending the time for performance of the contract, also found that the contractor who was to do the paving on the site was delayed by the Government's failure to release portions of the site to it (R. 11, 13, Fdg. 4).

Neither change order nor stop order was ever issued. No adjustment in contract price was made.

Soon after the work commenced it became apparent that the Government would be unable to complete its part of the work in time, and that the contractor would consequently be prevented from completing in the contract period (R. 10, Fdg. 4). The contractor was obliged to continue its work in an irregular fashion, with its supervisory force and equipment always standing by (R. 15, Fdg. 6), and completed it 277 days after the date of notice to proceed (R. 10, Fdg. 3), which was more than double the 120 days which the contract allowed for the work (R. 9, Fdg. 2). The court below, as well as the contracting officer, absolved the contractor of any responsibility in connection with the delay, and both found the source of the delay to have been the Government's failure to make the site available for the work (R. 10-14, Fdg. 4). This failure in turn arose directly from the fact that the stabilizing and preliminary operation took more time than had been anticipated (R. 10-14, Fdg. 4).

REASONS FOR DENYING THE WRIT.

The court below did not hold, as petitioner contends, that the Government had the obligation under the contract to make it possible for the contractor to complete its work in 120 days. What the court below held was that the petitioner had the obligation of not making it *impossible* for the contractor to complete its work in the contract time by failing to carry out those parts of its obligation which were both necessary and preliminary to the contractor's work. The language of the opinion below must be read against the background of the facts which were before the court. The interpretation put upon it by petitioner is extravagant.

Petitioner appears to contend that it was free to have taken years in its preparatory work, even after notice to proceed was given the contractor, and that it was under no limitation or requirement with respect to the length

of time it might compel the contractor to remain at the site with its supervisory forces and equipment, proceeding in a retarded and erratic fashion. Obviously there is a relation between the petitioner's preparatory work and that to be performed by the contractor. No other meaning can be drawn from the contract than that when the notice to proceed was issued by the Government, it carried with it the assurance that the Government would do what was necessary on its part so as not to prevent the contractor's completion.

It is to be observed that the contract did not compel the issuance of the proceed order at any particular time nor was the Government obliged to issue it until it was ready to do so. But when the Government issued the proceed order, the requirements of the contract were set in motion and the contractor was bound to complete the work within 120 days thereafter.

The delays were of a character similar to those involved in *Henry Ericsson Company* v. *United States*, — C. Cls. — (decided October 1, 1945, cert. den. March 5, 1946, No. 701) where there was a failure by the government to give necessary approvals, and in *Largura Construction Co.* v. *United States*, 88 C. Cls. 531, where the government failed to furnish necessary models.

It will also be observed that no change order or stop order was issued, as was the case in *United States* v. *Rice*, 317 U. S. 61. In *United States* v. *Rice*, upon which petitioner relies heavily, sub-surface or latent conditions were discovered at the site shortly after the work commenced. As a consequence alterations in the plan of the work were ordered and extensions of time for performance, as well as adjustments in the contract price, were made. The contention of the Government in the Rice case was stated to be (317 U. S. 64):

> "The government contends, as it did in the *H. E. Crook Co. Case, supra*, that the change in specifications resulting in delay was not a breach of the con-

tract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the government was required to do no more than grant an extension of time."

There is no such situation here. The Government simply found that more time was required for the performance by it of its own preliminary work. While the court below referred to the time limit of 120 days as being a mistaken calculation (R. 17),[1] it seems more likely that the mistake involved was that of the estimate by the Government for its own part of the work, particularly since the record shows that the contractor's work could ordinarily be done in 120 days, but that the Government's delays prevented it (R. 10-14, Fdg. 4). It did not undertake to stop the respondent's work nor did it issue any change orders. Had it done so the very costs which constitute the damages to the contractor in this case would have been avoided. The contractor could have suspended its operation and saved the payroll cost which continued to run on. It could have had the use of the same personnel and of its equipment elsewhere during that period of time when both labor and equipment were in great demand. Instead the Government elected to require the contractor to proceed in an inefficient and uneconomical manner necessitating the retention of its personnel, as well as equipment, on the site of the work during the entire period from the time of the proceed notice until final completion of its work.

Petitioner also relies upon *United States* v. *Blair*, 321 U. S. 730. In that case the contractor, Blair, made a claim for damages based upon delays occasioned him by another contractor who was performing work at the same site under an independent contract with the Government. The

[1] Petitioner suggests, for the first time, in a footnote to its petition that the contract time of 120 days may represent a mutual mistake. If so, respondent would be entitled to rescission and increased payment for work done on the basis of an extended period of performance.

delay did not prevent Blair from finishing within contract time but did prevent his finishing within a time considerably less than the contract requirement, which he might otherwise have done. The decision there was that the Government owed no obligation to require the co-contractor to enable Blair to finish within any time in advance of the limit fixed in the contract. That decision seems fairly to recognize that while no duty rests upon the Government to enable the contractor to complete in advance of the time fixed, there nevertheless is a duty not to interfere with the performance of the contractor nor to impede it so that it cannot finish within the time fixed.

H. E. Crook Co. v. *United States*, 270 U. S. 4, likewise arose out of a situation in which the government had let two contracts for performance of work at the same site. The contest involved the contract for the installation of mechanical equipment in the building which was being erected under the other contract. The contract provisions found in that case are wholly different from those found in the case at bar. The completion date of both contracts was expressly stated to be approximate only (270 U. S. 6) and these expressions were an important factor in the decision of that case. It was pointed out in the opinion that the Government could not have been expected to lay itself open to responsibility for the acts of another contractor. For it to have done so would in effect have made it a guarantor or surety for the other contractor's performance. But in the case at bar, it is the Government's own failure which caused the delay. In both the Crook case and the Blair case, the claimants knew that their own operations were dependent upon performance by another independent contractor. Here the respondent was entitled to assume that the Government would perform in good time the part of the work which it was executing.

Cases like *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, and *Day v. United States*, 245 U. S. 159, involving

delays attributable to submerged obstacles and floods do not give any support to petitioner's case.

CONCLUSION.

For the foregoing reasons it is submitted that the petition should be denied.

Respectfully,

ALEXANDER M. HERON,
WILLIAM L. OWEN,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 50

THE UNITED STATES, *Petitioner*

v.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

ALEXANDER M. HERON
WILLIAM L. OWEN
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Claims (R. 16-20) is reported in 63 F. Supp. 209.

Jurisdiction

Petitioner has invoked the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925 as amended. The judgment of the Court of Claims was entered on December 3, 1945 (R. 20).

Question Presented

The question presented is whether the United States are free from any responsibility to answer for the damages which resulted from their having delayed the respondent in the performance of its contract with them.

Statement

Respondent is an electrical contractor engaged in the business of installing of wiring and lighting systems. On June 27, 1940, it entered into a contract with the United States through the Civil Aeronautics Authority, whereby it undertook to furnish materials and perform the work for the field lighting of the Washington National Airport at Gravelly Point, Virginia for $187,000. The contract provided that the work was to be commenced as soon as practicable and that it was to be completed within 120 calendar days from the date of receipt of notice to proceed (R. 3). The Government gave notice to respondent to proceed on July 15, 1940, thus fixing the completion date as November 12, 1940 (R. 9). Respondent commenced its work immediately upon receipt of notice to proceed (R. 10) but soon after its work commenced it discovered that it would be unable to finish within the contract time because of the extended periods between releases by the defendant of areas in which it could work.

The site of the airport was created by hydraulic dredging and presented to the Government a problem of making the airport available for use before the time it would take an ordinary hydraulic fill to become sufficiently consolidated to withstand heavy traffic (R. 14). The Government's engineers were seeking to effect proper stabilization of the site in less than one year although it would ordinarily have taken four or five years for such stabilization (R. 14). They knew before the beginning of respondent's work or any major work at the site that they were confronted with the problem of quick stabilization (R. 14). The fill material

was dredged up and placed onto the site. In the process of dredging, pockets of unsatisfactory material were found and had to be replaced with other material. Where the material brought to the surface was of coarse, granular character it had to be mixed in definite proportions with fine or clay-like material in order to achieve proper compaction (R. 14-15). Paving of the runways was the last operation and preceded the respondent's operation which consisted of trenching, conduit work, wiring, installation of man-holes, hand holes, lights, and other work required under its contract. This work was done in the shoulders and taxiways and because of the necessity for maintaining stabilization could not be done before the paving (R. 15). Because of the lack of uniformity in the material deposited from the dredging operations the areas were not ready for delivery to the respondent except in an irregular manner (R. 15).

The length of time necessary to make the fill, stabilize the material, do the grading and paving was not anticipated by the Government's engineers, although they were skillful and diligent in their work and released areas to respondent as fast as they were able to do so (R. 15).

Respondent complained to the Government's representatives shortly after the commencement of the work and called their attention to the fact that delays then occurring would make it impossible to finish the work within the time limited in the contract (R. 10). The contracting officer replied, instructing respondent to keep the resident engineer and himself currently informed as to all matters of delay and stated that upon completion of the work, consideration would be given to an appropriate extension of time. Respondent complied with this procedure and both parties to the contract were fully informed as to delays (R. 10). During the course of the work the contracting officer made findings of fact pursuant to which he extended the time for performance 79 days for delays which had occurred up to and including December 12, 1940 (R. 10-12). The contracting officer stated in his findings that

> "Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner."

He stated further that it had been established that the Government had by force account graded certain areas of the airport and released those areas to the paving contractor, that upon completion of the paving those areas were then released to respondent. The contracting officer found that the respondent's record was free from any act on its part which caused delay and that its work was prosecuted diligently as far as was possible for it to do so. The contracting officer further found that respondent was at no time wholly stopped from its work but that such work as it was unable to do could have been done if the progress on the runways had been all that had been expected. He found that respondent had all equipment and materials ready, or that they could have been ready for use in time to allow performance and completion of the work immediately upon release of the areas to respondent, and that no delay would have been chargeable to respondent (R. 11).

Further delays occurred subsequently and from the same causes (R. 12). At the completion of respondent's work contracting officer again made findings of fact in which he extended the contract period by an additional 78 days (R. 13-14), at the same time noting that a mathematical computation of delay amounted to 110 calendar days (R. 13). Since the actual delay during the second period had amounted to only 78 days an extension of that length of time only was granted to respondent (R. 14).

The court below found that no evidence had been proffered that the facts were contrary to those found by the contracting officer (R. 14), and that there was no evidence in the case upon which a finding could be made as to delays by the paving contractor.

The contract contained a provision (R. 5, 10) to the effect that should the respondent fail or refuse to prosecute the work with diligence or complete it within contract time the Government might by written notice terminate its right to proceed. In that event the Government was authorized to take over the work and prosecute it to completion. If the Government did not exercise its right of termination *and* the contractor was permitted to proceed with the work, liquiated damages were to be chargeable on a *per diem* basis. A provision of the same article, however, denied the Government any right to terminate the contract or to charge liquidated damages if the delays were due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to "acts of the Government".

Article 3 of the contract authorized the making of changes (R. 4) with appropriate adjustments in the contract price and increases or decreases in the time required for performance.

Article 4 (R. 4-5) provided that should the contractor encounter, or the Government discover "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications" the contracting officer should modify the contract to provide for any increase or decrease of cost or difference in time resulting from such conditions.

Summary of Argument

If the United States cause a delay to the contractor in the performance of his contract, they are liable to him to the same extent as a private individual. This is true unless express provisions of the contract excuse them or unless the delays are due to the actual exercise of rights expressly reserved to the United States, such as the right to change the plans and alter the work. The United States did not exercise any of the rights which were reserved under this contract. The failure on the part of the Government was

in not proceeding with its part of the work with sufficient speed so that the work of the respondent could be completed within the agreed time.

Article 9 of the contract provides that the contractor shall not be charged with responsibility for delays attributable to a wide variety of causes, among them delays occasioned by the United States. There is nothing in Article 9 which provides that the United States shall be excused from the consequences of a breach which they commit resulting in delay to the contractor. Moreover the Government was the draftsman of the contract and it should be construed against it.

The contractor ought not to be required to speculate as to the ability of the Government to do its part of the work, particularly where the character of that work, stabilization of an hydraulic fill, is quite foreign to the work of the contractor, installation of wiring and lighting. Here the Government, itself, encountered a most common hazard in the performance of construction contracts, the underestimating of the time necessary for the work or the overestimating of its own capacity to do the work. The respondent ought not to be required to bear the burden of this erroneous calculation; on the contrary it should be entitled to rely on the Government's calculation as being correct.

Argument

The United States are liable for delays which they occasion to a contractor in the performance of his contract and are bound by the same rules which govern individuals in such instances, *United States* v. *Smith*, 94 U. S. 214. No departure from this rule was made either in *Crook Company* v. *United States*, 270 U. S. 4, or in *United States* v. *Rice*, 317 U. S. 61.

In *Crook Company* v. *United States, supra*, the contract required the furnishing and installing of a heating system in buildings which were to be constructed by another contractor. The contract completion date for the Crook Com-

pany's contract was "provisional". The contract showed that the buildings in which the system was to be installed were in progress of construction by contractors who might not keep up to time. It was apparent from the contract that if the general contractors were behind hand the Crook Company's contract would also be delayed. The contract further expressly provided that delays by the Government would be regarded as unavoidable. On the whole frame of that contract it was concluded that liability for delays resulting from tardiness of the general contractors was not to be assumed by the Government, although it was noted that the contract might have been more carefully drawn to express its intention. The form of contract which was used in the *Crook* case is quite unlike the form of contract which is involved in the present case. The decision in the *Crook Company* case turned solely upon the phrasing of the contract there involved. The language of that contract is so far dissimilar from the language of the contract in the case at bar that it offers no aid in the interpretation of the instrument under consideration.

That the *Crook* case established no general proposition of law is confirmed by *United States* v. *Wyckoff Pipe and Creosoting Company*, 271 U. S. 263. There the Government delayed the contractor by failing to furnish concrete bases and consequently prevented performance of the work for more than two years. The Government admitted its liability for damages resulting from such delays, thus recognizing the general rule that a contractee is liable to a contractor for causing delay in the performance of the latter's work.

United States v. *Rice*, 317 U. S. 61 is a case where, as in the *Crook Company* case, *supra*, the contractor had agreed to install mechanical equipment in a building which was to be constructed by another contractor. After notice to proceed was given, it was discovered that unsuitable sub-surface conditions existed on the site and it became necessary to change the location of the building with attendant altera-

tion in the specifications and work. Appropriate changes were made in the contract and there were adjustments both in price and in time of performance pursuant to those articles of the contract governing such a situation. In the case at bar there were neither subsurface or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications. In the present case the difficulty arises primarily from the fact that material which the Government obtained to create the fill varied somewhat from what was expected and as a consequence stabilization of the fill was delayed.

There is much reference in petitioner's brief to unexpected soil conditions. The contract specifically provides in Article 3 (R. 4) that changes may be made upon the discovery of "sub-surface and/or latent conditions at the site, materially differing from those shown on the drawings or indicated in the specifications"; it does not contain any reference to "soil conditions" as such. The soil conditions which were encountered in the present case were neither sub-surface nor latent; they were not the soil conditions which were covered by contract provisions. The site was constructed by hydraulic dredging (R. 14). Obviously dredging creates a void. The site could never have been built up by creating voids on one part to build up another part. The voids were not created on the site but were created in the adjacent river bed.[1] The material dredged was brought onto the site from this source. It was obviously subject to inspection by the Government's representatives as it was placed in position. In addition to this, the Government's witness in the court below testified that some of the material was brought from high ground west of the airport. This is not shown in detail in the findings which constitute the record here. In reality the soil which

[1] Brigadier General James B. Newman, who was in charge of this work, testified in the court below "Further than that, the material for construction of this airport existed in the river bed, and except for the quantity of material to be removed, offered no unusual difficulty".

was involved in this case was the material with which the Government was working in order to create the site, and that material appears to have varied somewhat from expectation. Changes were not authorized by the contract for the encountering of soil conditions of the character which developed here.

The Government argues that unanticipated difficulties do not excuse performance by a contractor, citing *Maryland Dredging Company* v. *United States*, 241 U. S. 184. That case is not in point nor is the rule cited in the least applicable where the unanticipated difficulties are the acts of the contractee. In such case the liability rests with him who created the difficulties. *Mueller* v. *United States*, 113 U. S. 153. It would be an absurd result if the Government were permitted to hold the contractor liable for either actual or liquidated damages as a result of delays which the Government itself caused.

There is a wide range of cases in which the United States have been held liable for delays occasioned a contractor. They are cases in which the United States have failed to furnish models required for the work,[2] where they have failed to approve plans and drawings or furnish other information necessary to the performance of the work.[3] There are also cases where the United States have failed to do the preliminary or commencement work and thus delayed the contractor to his damage.[4]

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[2] *Karno-Smith* v. *U. S.*, 84 C. Cls. 110;
Largura Construction Co. v. *U. S.*, 88 C. Cls. 531;
J. L. Young Engineering Co. Ltd. v. *U. S.*, 98 C. Cls. 310;
Plato v. *U. S.*, 86 C. Cls. 665.

[3] *M. Cain Co.* v. *U. S.*, 79 C. Cls. 290;
Newport News Shipbuilding Co. v. *U. S.*, 79 C. Cls. 1.

[4] *United States* v. *Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263;
Ouilmette Construction & Engineering Co. v. *U. S.*, 89 C. Cls. 334;
Gillen Co. v. *U. S.*, 88 C. Cls. 347;
Carroll v. *U. S.*, 76 C. Cls. 803.

Articles 3 and 4 of the contract have no application here. Article 3 reserves to the Government the right to make changes in the drawings and specifications and permits alterations in the structure or physical aspect of the work to be performed. Article 4 authorizes changes and adjustments under certain specified conditions, namely, the encountering of sub-surface or latent conditions at the site, materially differing from those shown on the drawings or specifications, or unknown conditions of an unusual nature materially differing from those ordinarily encountered in this character of work, and which are to be called to the attention of the contracting officer before such conditions are disturbed. Each of these articles has defined within it the limits of its application and contains as well the mechanics of its enforcement.

There remains only the question of whether or not Article 9 of the contract contains an affirmative provision relieving the United States from any liability for delays which they cause to the performance of the work. That article contemplates the failure of the contractor to finish within contract time. It is impossible to read the article to mean that the Government is authorized to terminate the contract because of delays which it caused. And this would be true even though delays by the Government were not expressly specified as delay for which the contractor is not to be held responsible.

It would be equally extravagant to say that the Government was entitled to charge liquidated damages for delays which it caused, if that right had not been expressly excluded. The consequence of this is that the exclusion of delays caused by the United States from those causes which would authorize termination of the contract is no more than a statement of the rule of law applicable to the contract without express provision. The rule has been stated in *United States v. United Engineering & C. Co.*, 234 U. S. 236, to be:

> "We think the better rule is that when the contractor has agreed to do a piece of work within a given

time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date; to do this would permit it to recover damages for delay caused by its own conduct."

The fact that delays are either unforeseen or unforeseeable or not anticipated does not mean that either party is excused because of them (*United States* v. *Gleason*, 175 U. S. 588, *Maryland Dredging Co.* v. *United States*, 241 U. S. 184) unless a specific provision in the contract so declares. Here the contract excuses delay of the contractor when caused by the Government, but there is no word excusing the Government from paying for the cost of its delay.

The contract was drawn by the United States and is its own standard form. Accordingly, it must be construed against the draftsmen to the extent that there is any ambiguity or doubt in its meaning. *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, *American Surety Co.* v. *Pauly*, 170 U. S. 133. It is not too much to expect that if the United States intended to be relieved from liability for delays which they occasioned to the contractor, the contract would so state in plain language. It is only fair to the contractor that it be warned of this additional hazard and element of speculation if it is expected to assume it on entering into the contract. It is unfair that the United States should be in the

position of causing damage of this character to the contractor and then escaping liability therefor as a consequence of a strained construction which is nowhere found in the contract in express terms. Neither of the parties ever understood that the contract excluded liability for such damages. The contractor commenced to make its claim on this account at an early stage in the work (R. 10). The contracting officer never denied liability for such a claim but it was finally rejected because the Civil Aeronautics Authority was without jurisdiction to consider it.[5] In *United States* v. *Mason & Hanger*, 260 U. S. 323 it was said:

> "What is the import of this practical interpretation? The government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer, to express and provide for the purpose of the government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer, in a sense, is a party to the contract, not only representing but speaking for the impersonality of the government. Competent, therefore, it would seem, to declare the meaning of the contract."

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[5] The letter of the Acting General Counsel of the Civil Aeronautics Administration, denying respondent's claim for damages, referred to R. S. 3678, providing that appropriations should be applied solely to the objects for which they are made and advised that respondent's claim constituted a claim for damages for which no appropriation was available. It reasoned that there was no authority conferred on the Civil Aeronautics Administration to determine the claim, and that it had no authority to make a finding of fact concerning the claim. Respondent was advised that the decision that the Civil Aeronautics Administration was without authority to settle claims, did not constitute a decision on the merits of the claim, or upon the liability which might be imposed on the Government by the courts. This was the basis of the administrative action upon respondent's claim. Its denial was not because of untimely filing, as suggested by the footnote on page 23 of petitioner's brief. The letter mentioned was received in evidence in the court below.

It is apparent that the difficulty in the present case arose from the failure of the Government's engineers to estimate the length of time which would be required to complete the fill and stabilize the site, having in mind the possibility that material of a varying character might be brought up from the adjacent river by the dredging operation. The possibility of such a delay should have been very apparent to the Government's engineers. On the other hand, it could not have been in the least apparent to the contractor who was to install merely the electrical wiring and lighting on the site. It could not be expected that the contractor was to assume that the Government engineers had made errors or miscalculations of judgment in the time which they would require for the completion of their part of the work and certainly it must be assumed that the Government engineers thought that they had made correct calculations upon which they based the time requirement for the performance of the respondent's contract. Possibly there was excessive enthusiasm on the part of the Government engineers as to the time within which they could complete the fill and stabilize the site.

There is some disposition on the part of the Government to excuse its failure to have the site in such order as to enable the contractor to proceed, by pointing out that the acts of the Government were not wilfull or malicious. But the case is not one of tort, the question is whether the Government was bound to do what was required on its part so as not to prevent timely performance. Some effort is also made to say that Section 3-16 of the Specifications relieves the Government of liability because the contractor was required to satisfy itself as to "the general and local conditions, and all other matters which can and in any way affect the work under this contract" (R. 9). But the only thing the contractor could do was to determine that the Government itself would do other work at the site. The contractor was not bound to assume that it would be delayed by the Government.

Conclusion

The contractor should be entitled to calculate his contract price on the assumption that the Government will do its part of the work without causing such delay as to project respondent's performance beyond contract time. If the work is so projected, it is only fair that the additional costs arising as a result, be paid by the Government as a part of the value of the labor and service which it receives. This is especially true where the contract does not expressly warn the contractor that the Government is not to be considered liable for damages as the result of any delay which it causes. It is submitted that the decision of the court below was just and proper and it should be affirmed.

Respectfully,

ALEXANDER M. HERON
WILLIAM L. OWEN
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1946.

The United States, Petitioner, v. The Howard P. Foley Company, Inc. } On Writ of Certiorari to the Court of Claims.

[November 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The Court of Claims rendered a judgment for the respondent and against the Government for an asserted breach of a construction contract. 63 F. Supp. 209. We granted the Government's petition for certiorari which alleged that the Court of Claims' decision was in direct conflict with *Crook* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61. We hold that the Government's contention is correct.

The respondent, an electrical contractor, agreed for a fixed fee to supply the materials for and install a field lighting system at the National Airport, Gravelly Point, Virginia, then under construction. The agreement was embodied in a standard form Government contract. Respondent promised to complete the job within 120 days after notice to proceed. In fact the job was not finished until 277 days after notice was given. The delay came about in this way. The site of the airport was being built up from under water by a fast but then unique method of hydraulic dredging. As portions of the earth base for the runways and taxiways settled, they were to be paved and the shoulders "rough-graded." As segments of this work were finished, respondent was to move in, wire them, and install the lighting fixtures. The dredging took longer than Government engineers had anticipated, because some of the dredged soil, proving to be too unstable for runways and taxiways, had to be replaced. This in turn delayed completion of the runway sections and until each

was finished the lighting equipment for each segment could not be installed. The 157 days delay resulted from the consequently long and irregular intervals between the times when these segments were made available to respondent to do its job. But for these delays, respondent apparently could have finished its work in 120 days.

The Court of Claims considered that the Government breached its contract by failing to make the runways available in time for respondent to do its work within 120 days. The judgment against the Government was for certain overhead and administrative expenses which respondent incurred during the consequent period of delay.[1]

In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time. *Cf. U. S. v. Blair*, 321 U. S. 730, 733–734. It is suggested that the obligation of respondent to complete the job in 120 days can be inverted into a promise by the Government not to cause performance to be delayed beyond that time by its negligence. But even if this provision standing alone could be stretched to mean that the Government obligated itself to exercise the highest degree of diligence and the utmost good faith in efforts to make the runways promptly available, the facts of this case would show no breach of such an undertaking. For the Court of Claims found that the Government's representatives did this work "with great, if not unusual, diligence," and that "no fault is or can be attributed to them." Consequently, the Government cannot be held liable unless the contract can be interpreted to imply an unqualified warranty to make the runways promptly available.

We can find no such warranty if we are to be consistent with our *Crook* and *Rice* decisions, *supra*. The pertinent

[1] The damages awarded were for the wages respondent paid supervisory employees who stood by during the delay intervals, and for certain expenses of respondent incurred on account of these employees for unemployment and similar taxes.

provisions in the instant contract are, in every respect here material, substantially the same as those which were held in the former cases to impose no obligation on the Government to pay damages for delay. Here, as in the former cases, there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site, and clearly contemplated that he would take up his work on the runway sections as they were intermittently completed and paved. Article 9 of the contract entitled "Delays-Damages," set out a procedure to govern both parties in case of respondent's delay in completion, whether such delay was caused by respondent, the Government, or other causes. If delay were caused by respondent, the Government could terminate the contract, take over the work, and hold respondent and its sureties liable. Or, in the alternative, the Government could collect liquidated damages. If, on the other hand, delay were due to "acts of the government" or other specified events, including "unforeseeable causes," procedure was outlined for extending the time in which respondent was required to complete its contract, and relieving him from the penalties of contract termination or liquidated damages.

In the *Crook* and *Rice* cases we held that the Government could not be held liable for delay in making its work available to contractors unless the terms of the contract imposed such liability. Those contracts, practically identical with the one here, were held to impose none. See also *U. S.* v. *Blair, supra*. The distinction which the Court of Claims found between this and the prior cases is not in point. It seems to be this: In the *Crook* and *Rice* cases

the Government had a prime and a subcontractor; the Government reserved a right to make changes by which the prime contractor must thereafter be governed; the Government exercised this right; these changes made it impossible for the prime contractor and ultimately the subcontractor to do their work in time; since the Government had reserved the right against the prime contractor to make these changes, and the subcontractor knew this, the Government was not contractually responsible for the delay. Therefore it is suggested that the subcontractor in the *Rice* and *Crook* cases could know in advance that the performance time was "provisional" whereas here the contractor had reason to believe that it was certain. But in this case there is ample indication both in the extrinsic facts and in the contract terms that changes and delays were anticipated and remedies therefor provided. The contractor here only lacked the one additional indication that changes were anticipated which he could have read from the prime contract had there been a prime contract and if a prime contract had been available for him to read. If this be a distinction, it is a distinction with no significant difference. This contract, like the others, shows that changes and delays were anticipated and provided for. The question on which all these cases turn is, did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold again that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

Reversed.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent. It is admitted that the Government had given the contractor "notice to proceed" which in our opinion had the legal consequences set forth in the opinion of the court below whose judgment we would affirm.